No. 83-719

IN THE

Supreme Court of the United States

October Term, 1983

PETER DURO,

Petitioner,

vs.

DISTRICT ATTORNEY,
SECOND JUDICIAL DISTRICT OF
NORTH CAROLINA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether Mr. Duro's reasons for failing to comply with North Carolina's compulsory attendance laws are religious in nature?

II. Even if Mr. Duro has constitutionally protected religious beliefs against sending his children to public or nonpublic schools, whether North Carolina's interest in compulsory education is of "sufficient magnitude to override" that interest?

TABLE OF CONTENTS

TABLE OF CASES

TABLE OF CASES (continued)

CONSTITUTIONAL PROVISIONS

STATUTES INVOLVED

MISCELLANEOUS TABLE

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Respondent respectfully requests this Court to deny the petition of Peter Duro for a writ of certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit entered herein on July 14, 1983.

STATEMENT OF THE CASE

Under North Carolina law, the parents of all children between the ages of 7 and 16 are required to enroll their children in public or non-public schools. See N.C.G.S. §115C-378, 548 and 556. The Attorney General has opined that a parent cannot meet this requirement by educating his children at home, 40 NCAG 211 (1969) and 49 NCAG 8 (1979), and the State Board of Education has adopted rules to that effect. 16 NCAC 2D.0402. Recently, the North Carolina Court of Appeals has confirmed that home instruction is not a permissible means of complying with

North Carolina's compulsory attendance law. *Delconte v. State of North Carolina,* ____ N.C. App. ____, ____ S.E. 2d. ____ (December 8, 1983).

Contrary to North Carolina law, petitioner, Peter Duro, chose to teach his children at home and was prosecuted by the respondent, the District Attorney for the Second Judicial District of North Carolina, for violation of N.C.G.S. §115C-378. On March 23, 1981, the warrants against Mr. Duro were quashed because of technical defects. Shortly thereafter, he filed this action in which he claims that N.C.G.S. §115C-378, as applied to him, violates the First Amendment to the United States Constitution because his religious beliefs prohibit him from sending his children to public or nonpublic schools.

Peter Duro is an office manager for a trucking firm. He and his wife have six children, five of whom are of school age. (J.A. pp. 22-23)[1] Their hopes for their children do not differ from other parents. They expect their children upon reaching eighteen to "go out and work in the world or function in the world." (J.A. pp. 79-80) "They're not going to be hermits." (J.A. p. 80)

Their children, however, are educated in their home. Mr. Duro is away from home during the day and does not participate in the instruction of his children, though he holds a teaching certificate from the State of New York as a business teacher. (J.A. pp. 34 and 69) That responsibility is Mrs. Duro's. Mrs. Duro does not hold a teaching certificate from any state and has never been trained as a teacher. (J.A. pp. 31-32)

The method of instruction used by the Duro's and implemented by Mrs. Duro does not involve any lecturing or active teacher involvement. Rather, their children are largely "self-taught" through the means of a programmed,

[1]Reference is to the Joint Appendix filed by the parties in the Fourth Circuit.

self-explanatory curriculum (The Alpha Omega Christian Curriculum) purchased by the Duros. (J.A. pp. 64-72) According to Mrs. Duro, "you don't need teachers" for this method of instruction. (J.A. p. 71)

The Duros are Pentacostal. They have no religious objections to education; nor do they have any religious belief which requires them to instruct their children at home. (J.A. pp. 106-107) Though not members of any particular church, the Duros attend the Assembly of God, a Pentacostal church, each Sunday evening. (J.A. p. 104) The majority of the members of that congregation send their children to public schools. (J.A. p. 105)

Upon arriving in Tyrrell County, in January of 1981, the Duros did not visit the public schools or present their children for enrollment because of concerns about "secular humanism" and "unisex dress" in the schools. (J.A. pp. 40-41) Mr. Duro did visit the Cabin Swamp Christian School, a school operated by the Church of Christ which has approximately 100 students. (J.A. p. 36) The Cabin Swamp School uses the same curriculum as the Duros. (J.A. p. 37) Mr. Duro, however, differs with the operators of the Cabin Swamp School on the issues of "unisex dress" and "water baptism".

Based on this evidence the District Court granted summary judgment for Mr. Duro and enjoined respondent from enforcing North Carolina's compulsory attendance laws against him. Respondent appealed to the Fourth Circuit and that court on July 14, 1983 reversed the District Court. This petition followed.

SUMMARY OF RESPONDENT'S ARGUMENTS

The First Amendment prevents state enactment of laws prohibiting or restricting the free exercise of religion. Mr.

Duro, however, does not enjoy absolute freedom of religion. While his freedom to believe remains inviolate, his freedom to act is subject to reasonable regulation for the protection of society. *Cantwell v. Connecticut*, 310 U.S. 296, 84 L.Ed. 1213 (1940).

This Court has established an orderly procedure for determining whether a state statute unconstitutionally infringes the Free Exercise Clause of the First Amendment. *United States v. Seeger*, 380 U.S. 163, 185, 85 S.Ct. 850, 863, 13 L.Ed. 2d 733 (1965). This two-part process requires the Court to determine: (1) whether a sincere religious belief is present and infringed by enforcement of the statute; and (2) if a sincere religion is present and infringed, whether the state's interest in the statute is of "sufficient magnitude to override the interest claiming protection under the Free Exercise Clause." *Wisconsin v. Yoder*, 406 U.S. 205, 215, 92 S.Ct. 1526, 32 L.Ed 2d 15 (1972).

The District Court held for Mr. Duro on both these issues. The Fourth Circuit held that while Mr. Duro did have religious beliefs against sending his children to the public schools or the available nonpublic schools, the State's interest in compulsory education was sufficient to override Mr. Duro's beliefs. It is respondent's position that Mr. Duro has not met either part of the free exercise test. First, Mr. Duro's objections to sending his children to public or nonpublic schools are personal and philosophical in nature and flow from a rejection of contemporary secular values. However sincere those beliefs may be, they are not beliefs which "rise to the demands of the Religion Clause" *Wisconsin v. Yoder, supra.* 406 U.S. at 215-216. Second, the State's interest in compulsory education is sufficient to outweigh Mr. Duro's interests. This Court has stated that a state may refuse to accept instruction at home as compliance with compulsory education statutes even in the face of religious beliefs to the contrary. *Board of Education v.*

Allen, 392 U.S. 236, 246-247, 188 S.Ct. 1923, 20 L.Ed 2d 1060 (1968). An examination of *Wisconsin v. Yoder, supra*, and other subsequent cases establishes the continuing viability of this principle.

REASONS FOR DENYING THE WRIT

I. Mr. Duro's reasons for failing to comply with the Compulsory Attendance Laws are not religious in nature.

The threshold question for determination here is whether Mr. Duro's reason for educating his children in his home are religious in nature. *United States v. Seeger, supra.* If those reasons are not religious in nature there is no First Amendment infringement and, accordingly, no need for further inquiry by the Court. *Africa v. Commonweath of Pennsylvania*, 662 F. 2d 1025, 1030 (3rd. Cir. 1981) *cert. den.* 456 U.S. 908, 102 S.Ct. 1756, 72 L.Ed. 2d 165 (1982).[2]

A determination of whether a particular belief is religious in nature "present[s] a most delicate question". *Wisconsin v. Yoder, supra*, 406 U.S. at 215. "It is nonetheless incumbent on the courts to insure that a free exercise claim is granted only when the threshold belief is religious in nature." *Callahan v. Woods*, 658 F. 2d 679, 685 (9th Cir. 1982). Any lesser standard is unacceptable for "the very concept of ordered liberty precludes allowing" Mr. Duro from making "his own standards on matters of conduct in which society as a whole has important interests." *Wisconsin v. Yoder, supra.*

This Court has provided guidance as to the type of analysis to be applied in determining whether a belief interposed against enforcement of a statute or regulation is

[2]In order to enjoy First Amendment protection a religious belief must also be sincerely held. *United States v. Seeger, supra.* Respondent, however, does not challenge the sincerity of Mr. Duro's beliefs.

religious in nature. The nature of the inquiry is factual, *United States v. Ballard,* 322 U.S. 78, 64 S.Ct. 882, 88 L.Ed. 1148 (1944), but that inquiry does not extend to the truth, validity or reasonableness of the asserted religious belief.[3] This proscription includes any analysis of "intra-faith differences". *Thomas v. Review Board,* 450 U.S. 707, 751, 101 S.Ct. 1425, 67 L.Ed. 2d 624 (1981). This Court, however, has never provided lower courts with a comprehensive definition of religion for application in First Amendment cases. *Africa v. Commonwealth of Pennsylvania, supra,* 662 F. 2d at 1031; Note, *Toward a Constitutional Definition of Religion,* 91 Harv. L. Rev. 1056, 1057 (1978). Nevertheless, this Court has held that certain beliefs *are not* religious in nature. Under the Court's holding in *Wisconsin v. Yoder, supra,* beliefs which are "philosophical or personal" in nature or beliefs which manifest themselves in "a way of life...based on purely secular considerations" do not qualify for Firs Amendment protection.

The lower courts failed to take the distinction between religious beliefs and personal or philosophical beliefs into account in ruling for Mr. Duro on the first part of the Free Exercise test. When this distinction is taken into account, it becomes clear that petitioner failed to carry his initial burden.

Mr. Duro has no religious belief against education or any religious belief which requires him to educate his children in his home. His reasons for refusing to send his children to public or nonpublic schools have a far more narrow basis. According to Mr. Duro, he did not send his children to

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[3] "I cannot give up my guidance to the magistrate; because he knows more of the way to heaven than I do & is less concerned to direct me right than I am to go right." JEFFERSON. *Notes and Proceedings on Discontinuing the Establishment of the Church of England* (1776), in 1 The Papers of Thomas Jefferson 525, 547 (J. Boyd ed. 1950), quoted in *Africa v. Commonwealth of Pennsylvania, supra,* 662 F. 2d at 1030 fn. 7.

public school because of the prevalence of "secular humanism" and "unisex dress" and he did not send his children to the Cabin Swamp Christian School because children enrolled there dressed in a "unisex fashion". Mr. Duro did express some differences between his religious beliefs and those of the operators of the Cabin Swamp School but he testified that the curriculum at Cabin Swamp is presented in such a way that it wouldn't be offensive to him or contradict his beliefs.

These beliefs, respondent contends, are philosophical and personal in nature, not religious in nature. The Third Circuit has adopted the principle that the extent to which a belief is based upon "ultimate concerns" should be the principal measure of whether a belief is religious or not. *Africa v. Commonwealth of Pennsylvania, supra,* 662 F.2d at 1032-1035. That position seems to have been adopted in large part from the views expressed by the author of *Toward a Constitutional Definition of Religion, supra,* at 1075-1076, where an ultimate concern is described as follows:

> Clearly not every belief—not even all those quite strongly held—constitutes a matter of ultimate concern. How is the individual to decide whether a view is his ultimate concern or merely a matter of great importance to him? Much of the concern about the expansive approach [to the legal definition of religion] reflects a fear that approach is undefinable, hence illimitable. Tillich describes two characteristics which may be helpful. (1) An ultimate concern is an act of the total personality, not a movement of a special and discrete part of the total being. ... Thus, the belief happens "in the center of the personal life and includes all its elements." (2) An ultimate concern must be unconditional, made without qualification or reservation. This attribute, in large measure an

> outgrowth of the first, prevents an individual from defining his ultimate concern conjunctively as "X and Y and Z." Each element cojoined implies a reservation or condition on the other elements. For example, should an individual try to define his ultimate concern as "helping my fellow men and achieving personal fulfillment," he runs afoul of problems of tradeoff. In some instances, a given action might advance one goal but only at the expense of the other. The goal the individual elects to compromise cannot be called ultimate.

The record clearly establishes that the beliefs which led Mr. Duro to decide to educate his children at home are not matters of ultimate concern to him. He has no religious belief which requires him to educate his children at home. The decision to educate his children at home was made because of his opposition to secular humanist values allegedly prevalent in the public schools and unisex dress; concerns which perforce come and go with changes in secular values or fleeting modes of dress and, therefore, are conditional and qualified. The "non-ultimate" nature of Mr. Duro's beliefs against education in schools is established by the District Court's opinion: Mr. Duro "does not believe that no acceptable school could be conceived, for he sent his children to school while attending Bible college." (A. p. 121)

II. Even if Mr. Duro has constitutionally protected religious beliefs against sending his children to public or nonpublic schools, the state's interest in compulsory education is of "sufficient magnitude to override" that interest.

That education is of the highest importance in a democracy cannot be doubted. *Brown v. Board of Education,* 347 U.S. 483, 493, 74 S.Ct. 686, 98 L.Ed. 2d 873

(1954); *San Antonio School District v. Rodriquez*, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed. 2d 16; *Wisconsin v. Yoder supra*, 406 U.S. at 213. It "has a fundamental role in maintaining the fabric of our society." *Plyler v. Doe*, 457 U.S. 202, 221, 102 S.Ct. 2382, 72 L.Ed. 2d 786, 802 (1982). When children are not educated "significant social costs [are] borne by our Nation." *Id.*

This Court has consistently recognized that a State's interest in education may be furthered by requiring compulsory school attendance, even in the face of First Amendment claims. *Pierce v. Society of Sisters*, 268 U.S. 510, 534, 69 L.Ed. 510 (1925); *Wisconsin v. Yoder, supra; Wolman v. Walter*, 433 U.S. 229, 240, 97 S.Ct. 2593, 53 L.Ed. 2d 714 (1977). The scope and importance of this interest extends to permit the State to refuse "to accept instruction at home as compliance with compulsory education statutes." *Board of Education v. Allen, supra.*

In holding North Carolina's compulsory attendance statute unconstitutional as applied to Mr. Duro, the District Court itself recognized the theoretical extent of the State's interest in education.

> In the abstract, the state has a compelling interest in compulsory school attendance as a means of assuring that all children in the state receive a basic education sufficient to prepare them for the duties of citizenship, for participation in the political process, and for a self-sufficient and productive position in the society. (J.A. p. 124)

The District Court, however, refused to give North Carolina the benefit of this "abstract" principle because of a decision by the North Carolina General Assembly to deregulate nonpublic schools. As described by the District Court:

> The North Carolina compulsory school attendance law requires all children of school age to attend a school, which is defined "to embrace all public schools and such nonpublic schools as have teachers and curricula that are approved by the State Board of Education." N.C.G.S. §115C-378. In light of amendments made in 1979 and 1981 to the statutory provisions governing nonpublic schools, "approval" by the State Board of Education of a school is in fact nonexistent. The North Carolina General Assembly has radically deregulated the operation of nonpublic schools and removed from the State Board any supervisory authority. So long as a school notifies the Board that it is in operation, keeps attendance records, complies with health and safety requirements, and administers periodic standardized tests, attendance at the school qualifies under N.C.G.S. §115C-378. (A. p. 121)

Because of this recently adopted laissez-faire policy toward nonpublic schools, the District Court ruled that North Carolina's interest in compulsory education was not sufficient to override Mr. Duro's interest in maintaining his religious beliefs.

> The state has so drastically undercut its asserted interest in the universality of education that the court cannot conclude that what survives is compelling. If the state makes no attempt to maintain minimal educational standards in nonpublic schools, its requirement that a school be attended is little more than empty coercion, particularly when those children are in fact being relatively well-educated at home (A. pp. 125-126)

As the Fourth Circuit recognized, this reasoning by the District Court was erroneous. Mr. Duro, however perpetuates the District Court's error and argues in his petition that North Carolina's deregulation of nonpublic schools carried with it an abandonment of its compelling interest in education. Mr. Duro's error is established by an analysis of *Wisconsin v. Yoder, supra,* both from the perspective of the weight to be accorded Mr. Duro's asserted interest and from a comparison of North Carolina's approach to compulsory education with Wisconsin's.

In Yoder, this Court did not altogether abrogate Wisconsin's compulsory attendance law in the face of the religious claims of the Amish. Wisconsin's law was simply limited in its scope. To paraphrase this Court: Wisconsin's interest in requiring Amish children to attend public school beyond the eighth grade was not of sufficient magnitude to override the interest of Amish parents in integrating their children into the Amish religious community. It is this limited scope of the decision in *Yoder* which establishes the sufficiency of North Carolina's interest in its compulsory attendance law to outbalance the interest of Mr. Duro.

First, unlike the Amish parents, Mr. Duro seeks abrogation of the compulsory attendance law in its entirety, not simply its temporal limitation. In his concurring opinion in *Yoder*, Justice White, joined by Justices Stewart and Brennan, made it clear that the First Amendment does not permit complete nullification of compulsory school attendance on First Amendment grounds.

> This would be a very different case for me if respondents claim were that their religion forbade children from attending school at any time and from complying in any way with the educational standards set by the State. 406 U.S. at 238.

Since *Yoder*, two courts have considered the question of whether religious beliefs of parents relating to home instruction of their children outweigh total noncompliance with compulsory attendance laws and both courts have held against the parents. *West Virginia v. Riddle*, 285, S.E. 2d 359 (W. Va. 1981) and *Jernigan v. State*, 412 So. 2d 1242, 1245 (Ala. Ct. of App. 1981). As the West Virginia court said:

> Sincerely held religious beliefs are never a defense to total noncompliance with the compulsory school attendance law. 285 S.E. 2d at 365.

Further support for North Carolina's position is found in the recent decision of this Court in *United States v. Lee*, 455 U.S. 252, 102 S.Ct. 1051, 71 L.Ed. 2d 127 (1982) where guidance was provided as to the level of interest sufficient to outweigh an individual's First Amendment claim. In that case, an Amish farmer and carpenter, who held religious beliefs against the receipt of public insurance benefits and the payment of taxes to support public insurance funds, asserted that the required payment of social security taxes violated his First Amendment free exercise rights. This Court accepted the validity of the plaintiff's religious belief but held against him because of the nature of the governmental interest at stake. That governmental interest was simply the need for mandatory participation in the Social Security program in order to maintain the "fiscal vitality" of that program. 455 U.S. at 258.

The State's interest in requiring children to attend school is no less important than the fiscal intergrity of the Social Security System. "Education has a fundamental role in maintaining the fabric of our society. *Plyler v. Doe, supra.* Indeed one member of the Supreme Court, criticizing *Wisconsin v. Yoder, supra,* has expressed the view that a State's interest in requiring children to attend school "is surely not inferior to the federal interest in collecting social

security taxes." *United States v. Lee, supra,* 455 U.S. at 263, n. 3 (Stevens concurring).

Second, Mr. Duro, unlike the Amish, seeks this abrogation, not on the basis of the longstanding beliefs and practices of an *organized religious group,* but upon the basis of his *own* newly found "religious beliefs". To hold that the isolated beliefs of a single individual, whether religious in origin or not, are sufficient to override the long recognized substantial interest of the State in enforcement of its compulsory attendance laws is not permissible under *Yoder* and would, in practical effect, render compulsory attendance laws unenforcible and meaningless.

"The essence of American religion is its diversity and radial pluralism." *Toward a Constitutional Definition of Religion, supra,* at 1069 citing Ahlstrom, *A Religious History of the American People* (1972). Mr. Duro's objections to sending his children to public or nonpublic school because of concerns about "secular humanism" and "unisex dress" represent only a small fraction of the religious beliefs which could be interposed against compulsory education. For example, with the recent growth of "fundamentalism" it is not difficult to conceive of numerous "religious" reasons (e.g., the presence of dancing, required physical education, etc., in schools) which could be advanced by parents as a justification for ignoring compulsory attendance and educating their children in their homes. To respondent, these objections are legally indistinguishable from the objections of Mr. Duro. The Wisconsin Court of Appeals was on the mark when it said in rejecting a claim practically identical to Mr. Duro's:

> "Acceptance of [the parents] claim would open the door to all objections to part or all of the subject matter taught in public schools. The possibility of selective withdrawals of children by individual

> parents would effectively destroy the compulsory school system." *State v. Kasuboski*, 87 Wis. 2d 407, 275 N.W. 2d 101, 103 (1978).

Finally, it is clear that the question presented here is essentially one of educational policy; not one of legal principle applicable to this case. A State has two closely related, but nevertheless independent, interests in education. One is in the universality of education as recognized in *Wisconsin v. Yoder, supra*, 406 U.S. at 214; the other in the quality of education.

The State's interest here arises principally from its compelling interest in the universality of access to an education and that interest is sufficient to override plaintiff's interest. As a part of its commitment to universal education, North Carolina does not permit home instruction. It does not permit home instruction because the State has no mechanism by which to assure that children educated in their home by their parents are provided access to any education whatsoever. In the home instruction situation, the existence or nonexistence of any education is solely dependent upon the motivation and ability of the child's parents. And, unlike nonpublic schools, the State cannot rely upon the existence of collective market forces in the form of parental demands and concerns to assure that children have access to an education and that the education provided will be of some minimum quality.

Recourse to *Yoder* makes it clear that the relative level of control of the quality of programs in nonpublic schools does not effect the State's compelling interest in the universality of education. The degree of control exercised over nonpublic schools by Wisconsin at the time of *Yoder* does not differ markedly from the control exercised in North Carolina today. In Wisconsin, the only statutory requirements imposed upon nonpublic schools receiving

children of compulsory school age was, and is, that attendance reports be filed, 18 WSA 115.30, and that a very general curriculum be followed. 18 WSA118.01. By statute nonpublic schools were not required then or now to employ teachers certified by the State. 18 WSA 115.28(7). Given the relative lack of control by Wisconsin over the quality of education provided in its nonpublic schools, it clearly may be inferred that the compelling State interest identified and recognized by the Supreme Court in *Wisconsin v. Yoder, supra,* is universal education and not the quality of that education.

North Carolina has not waivered from its commitment to the universality of education. All children must attend a public school or a private school. Only the State's approach to the quality of education in nonpublic schools has changed. Previously, minimum quality in nonpublic schools was sought by means of regulations; now it is left largely to the collective concerns, demands and pressures of parents of private school children. This change reflects a shift in educational policy.

In *Yoder,* the Supreme Court admonished courts against delving into matters of educational policy:

> "Courts are...ill-equipped to determine the 'necessity' of discrete aspects of a State's program of compulsory education. This should suggest that courts must move with great circumspection in performing the sensitive and delicate task of weighing a State's legitimate social concern when faced with religious claims for exemption from generally applicable educational requirements." *Wisconsin v. Yoder supra,* 406 U.S. at 235.

And as Justice Powell stated in *San Antonio School District v. Rodriquez, supra:*

> The ultimate wisdom as to...[the] problems of

education is not likely to be divined for all time even by scholars who so earnestly debate the issues. In such circumstances, the judiciary is well advised to refrain from imposing on the State inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of everchanging conditions.

CONCLUSION

Mr. Duro may comply with North Carolina's compulsory attendance law by sending his children to the public schools, a private school or a church school. He has elected, however to attempt to instruct his six children at home, basically without a teacher, through the means of a programmed curriculum. That effort does not comply with North Carolina's compulsory attendance laws.

He attempts to have the compulsory attendance laws voided because of beliefs which can only be characterized as newly found, personal or philosophical. North Carolina's interest in having all children attend some type of "school" cannot be questioned. Balancing the petitioner's beliefs against the State's interest in accordance with *Yoder* requires denial of Mr. Duro's petition. To do otherwise would be to permit every parent, regardless of his ability, level of education, motive or intentions, to avoid sending his children to some school by simply asserting that because of his "religious views" he finds something offensive about the public or private schools. The First Amendment should not be construed to permit such a result.

This 30th day of December, 1983.

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Special Deputy Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that three (3) copies of the foregoing BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI were served upon counsel for Petitioner by depositing said copies in the United States Mail, postage prepaid, addressed as follows:

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This the 30th day of December, 1983.

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